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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PENNZOIL COMPANY,
Appellant,
v.
TEXACO, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

DAVID S. TATEL *
ALLEN R. SNYDER
WALTER A. SMITH, JR.
BRADLEY SAXTON
DEBORAH J. JEFFREY
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amicus Curiae National Association for the Advancement of Colored People

GROVER G. HANKINS
General Counsel
National Association for the Advancement of Colored People
4805 Mount Hope Drive
Baltimore, MD 21215
(301) 358-8900

* Counsel of Record

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

INTEREST OF AMICUS CURIAE

Amicus Curiae National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality and social and economic justice in this country. To promote these ends, the NAACP and its members engage in activity protected by the United States Constitution, including petitioning the government for the redress of grievances, marching and demonstrating in peaceful fashion, alerting the community to instances of discrimination, and advocating and organizing concerted action to influence

the political process and to spur social change. At times, these activities have met with legal action and threats of legal action in state courts. The NAACP has no fear of such legal action so long as the doors of the appellate courts—including this Court—are open to it to vindicate its rights. But if the NAACP were required to post a substantial supersedeas bond in order to gain effective access to the appellate process, it would not be able to do so; neither would many other public interest organizations, small businesses, or most ordinary citizens. It is for that reason that the NAACP is filing a brief in this case.

The NAACP has had first-hand experience with the effect of an unreasonable supersedeas bond on the appellate process. As a result of boycott activities subsequently held by this Court to be conduct protected by the First Amendment, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), a Mississippi trial court assessed damages against the NAACP in excess of $1 million. Mississippi law required the posting of a supersedeas bond equal to 1¼ times the amount of the judgment in order to stay immediate execution of that judgment pending appeal. Because the NAACP could not meet this bond requirement and because immediate execution of the judgment would have bankrupted the organization, the NAACP sought limited relief in federal court from Mississippi's bond requirements, claiming that the application of those requirements effectively deprived the NAACP of its constitutional rights. Had the federal courts not stayed the application of the bond requirements by enjoining enforcement of the judgment pending appeal to the Mississippi Supreme Court and thereafter to this Court, *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied sub nom. Claiborne Hardware Co.* v. *Henry*, 444 U.S. 1074 (1980), the NAACP would not have survived as an organization and could not have vindicated its First Amendment rights in this Court.

The narrow question in this case is whether the Second Circuit correctly determined that Texaco was entitled to similar relief from the Texas supersedeas bond. But in urging that Texaco is not entitled to such relief, Pennzoil makes two broad claims which threaten vital interests of the NAACP and which it therefore addresses in this brief. First, Pennzoil appears to contend that a state's supersedeas bond requirements can *never* be found unconstitutional as applied, even where they effectively preclude a defendant from seeking meaningful appellate review—including review by this Court. Second, Pennzoil contends that, in any event, a state-court defendant may *never* challenge the constitutionality of a state's bond requirements in a federal court.

For the reasons explained below, acceptance of Pennzoil's broad claims would unfairly and unconstitutionally deprive numerous state-court defendants of a meaningful opportunity to vindicate their federal constitutional rights. The NAACP therefore urges the Court to make clear that, whatever relief may or may not be due Texaco in this case, there *are* certain circumstances in which a state's supersedeas bond requirements violate Due Process rights, and there *are* certain circumstances in which a state-court defendant may choose to vindicate those rights in a federal court. The purpose of this brief is to describe those circumstances.

This amicus curiae brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Due Process precludes a state from imposing supersedeas bond requirements that are so oppressive that they effectively deny a litigant access to the state's appellate courts and, thereafter, access to this Court. Even if Due Process does not preclude such bond requirements

as to all litigants, it must preclude them as to involuntary state-court defendants whose only available process is appellate review. At a bare minimum, where fundamental constitutional rights are at issue, a litigant cannot constitutionally be denied access to state appellate courts through application of an oppressive supersedeas bond.

Federal actions attacking the constitutionality of a state's bond requirements are collateral to and wholly separate from the merits of the underlying state-court litigation. Such actions serve the limited purpose of ensuring fair access to the state appellate courts. A litigant—particularly an involuntary state-court defendant—has the choice under 42 U.S.C. § 1983 (1982) to bring such a collateral constitutional attack in a federal forum. Far from interfering with ongoing state-court adjudication, such limited federal actions ensure that meaningful state-court adjudication will in fact occur and that relief from this Court will thereafter be available.

Even if the Court overturns the relief granted Texaco in this case, it should make clear that a state cannot constitutionally impose oppressive bond requirements that effectively preclude appellate review, particularly where fundamental rights are at issue; it should also make clear that a litigant is entitled to choose a federal forum in which to attack the constitutionality of such state requirements.

ARGUMENT

I. A State May Not Constitutionally Prohibit Meaningful Access To Its Appellate Courts Through Imposition Of An Oppressive Supersedeas Bond Requirement

The NAACP acknowledges, of course, that the states are not constitutionally required to provide appellate court review of their trial courts' judgments;[1] on the other hand, it is well-settled that whatever appellate review the states *do* provide must meet the requirements of Due Process.[2] The NAACP also acknowledges that Due Process is not necessarily offended by the requirement of a reasonable supersedeas bond in connection with a stay granted to a losing party pending appeal; indeed, such a bond fairly serves to protect the prevailing party during the appeal process.

But a bond that is so oppressive upon the appealing party that it effectively *precludes* meaningful review—and is out of all proportion to any necessary protection of the previaling party's interest—necessarily violates Due Process. In the *Henry* case, for example, the NAACP would have been bankrupted had it been forced to comply with Mississippi's supersedeas requirements. 595 F.2d at 299-300, 305. Such draconian requirements prevent review as effectively as a rule that simply prohibits appeal altogether and should therefore be held violative of Due Process.

Any other conclusion would contradict a fundamental precept of our system of jurisprudence—that no party should be precluded access to the courts by virtue of

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[1] *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972).

[2] *See Evitts* v. *Lucey*, 469 U.S. 387, 400-01 (1985). Similarly, even if the state is not required to provide mechanisms for suspension of judgments pending appeal, *see Louisville and Nashville R.R.* v. *Stewart*, 241 U.S. 261, 263 (1916), having provided such mechanisms the state must comply with the requirements of Due Process and Equal Protection in permitting litigants to employ those procedures.

unreasonable requirements which it cannot meet. Under that standard, Texaco may be entitled to be free of the Texas bond requirements for the same reasons that the NAACP was entitled to be free of the Mississippi bond requirements in the *Henry* case. The important point is that a supersedeas bond is offensive to Due Process whenever it imposes unreasonable, oppressive, and unnecessary requirements as the price of an appeal, no matter the relative wealth or poverty of the would-be appellant. As this Court stated in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), "[j]ust as a generally valid notice procedure may fail to satisfy due process because of the circumstances of [a particular] defendant, so too *a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.*" *Id.* at 380 (emphasis added).

While we believe the principle recognized in *Boddie* should be controlling in this case, certain decisions subsequent to *Boddie* suggest that the Due Process right to be heard may be appropriately limited to (1) circumstances in which the party has no remedy other than the judicial forum, or (2) circumstances in which the underlying issue on which the party wishes to be heard involves a "fundamental" right. Thus, in *United States* v. *Kras*, 409 U.S. 434 (1973), the majority explained that "*Boddie* was based on the notion that a State cannot deny access, simply because of one's poverty, to a 'judicial proceeding [that is] the *only effective means of resolving the dispute at hand.*'" *Id.* at 443 (quoting *Boddie*, 401 U.S. at 376) (emphasis added).[3] In addition, the *Kras* major-

[3] Kras, an indigent allegedly unable to pay the filing fee required for a voluntary petition in bankruptcy, was thought *not* to have a Due Process right of access to the courts because he had alternative non-judicial avenues of relief. *Boddie*, on the other hand, involved indigent parties seeking a divorce, a remedy available to them only in court. Comparing these two situations, the *Kras* majority stated:

> In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relation-

ity thought a debtor's interest enjoyed less Due Process protection than the interest at issue in *Boddie*:

> Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. *See Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969). Neither does it touch upon what have been said to be the suspect criteria of race, nationality, or alienage.

409 U.S. at 446 (citation omitted).

By contrast, this Court more recently found unconstitutional Connecticut's requirement that the costs of blood tests used to disprove paternity be charged against an indigent defendant who could not afford the tests. Lacking those tests, the defendant was adjudged to be the father. *Little* v. *Streater*, 452 U.S. 1 (1981). In distinguishing the *Kras* and *Ortwein*[4] cases, this Court observed that

> [o]ur decisions in *Kras* and *Ortwein* emphasized the availability of other relief and the less "fundamental" character of the private interests at stake than those implicated in *Boddie*. *Because appellant*

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ship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*.

Kras, 409 U.S. at 445.

[4] In *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), a majority of this Court determined that welfare recipients' Due Process rights were not violated by a state's requirement that they file a $25.00 fee in order to pursue a judicial appeal of agency determinations marginally adjusting their benefits. In so holding, this Court again relied upon the existence of non-judicial "alternatives, not conditioned on the payment of fees," through which the appellants had been able to seek relief. *Id.* at 659. The Court also noted that, as in *Kras*, the interest asserted by these welfare litigants was of less constitutional significance and was therefore entitled to fewer Due Process protections than that at issue in *Boddie*. *Id.* at 659.

> *has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to* Boddie *rather than to* Kras *and* Ortwein.

Id. at 16 n.12 (emphasis added).

There are several important implications of *Boddie* and its progeny for the present case. First, Pennzoil is clearly wrong to contend that an oppressive supersedeas bond can *never* offend Due Process, even where its imposition effectively and unreasonably denies a party the right to be heard.

Second, even if such a bond does not violate the Due Process rights of *every* would-be litigant who is unable to satisfy the bonding requirements, it surely does so in the case of an involuntary state-court defendant who has *no* alternative remedy or forum for his claim except the state's courts. In other words, a state may afford Due Process through different procedures or forums, but if the *only* process the state offers to a party for vindication of its claims is the courts, meaningful access to those courts must be afforded.[5] Thus, *every* involuntary state-court defendant—like the NAACP in

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[5] As the Court stated in *Boddie*:

> [T]he successful invocation of this governmental power [the judiciary] by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and *the denial of defendants' full access to that process raises grave problems for its legitimacy.*

Boddie, 401 U.S. at 376 (emphasis added). The Court made this same point in *Streater*, in which it stressed that a *defendant* sued in state court for paternity payments had "no choice of an alternative forum" in which to vindicate his interests. *Streater*, 452 U.S. at 16 n.12; *see also Kras*, 409 U.S. at 444. Likewise, in *Ortwein*, 410 U.S. at 659-60, the Court stressed that appellants had been provided a hearing in a non-judicial forum, an alternative not conditioned on payment of a fee, in which the appellants were able to press their claims.

Henry and Texaco here—has a Due Process right that any state-created judicial appeal be free from an oppressive or impossible bond requirement that effectively denies that defendant a meaningful opportunity to be heard.[6]

The final implication of the *Boddie* line of cases—one that Pennzoil acknowledged in its Second Circuit brief but unfortunately ignores before this Court—is that *at a bare minimum* Due Process includes a right to be free of an oppressive bond where the merits of the appeal involve "fundamental rights."[7] While we do not believe that Due Process protections may be limited to certain "fundamental rights,"[8] nevertheless it is important that the Court *at the very least* reaffirm in this case the special procedural protection those rights enjoy.

The fundamental rights described in *Kras* involve numerous matters of great interest to the NAACP, including free speech, right to travel, and issues involving racial discrimination. 409 U.S. at 446. Hence, if the

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[6] Relying on *Boddie*, *Kras*, and *Ortwein*, the Third Circuit in *Lecates* v. *Justice of the Peace Court No. 4*, 637 F.2d 898 (3d Cir. 1980), found unconstitutional as applied Delaware's requirement that an indigent defendant post a surety bond in order to secure a trial *de novo* in Superior Court following an adverse determination by a justice of the peace. In reaching that determination, the Court found critical the state-court defendant's lack of alternative avenues for relief. *Id.* at 908-09.

[7] Before the Second Circuit, Pennzoil effectively conceded that *Boddie* and its progeny indicate that a supersedeas bond cannot operate to deny an appeal asserting fundamental constitutional rights. Pennzoil contended, however, that Texaco's appeal implicated no such rights, leaving Texaco, like Kras and the *Ortwein* appellants, without Due Process protections. Brief for Appellant at 36 n.14; *Texaco* v. *Pennzoil*, 784 F.2d 1133 (2d Cir. 1986) (Nos. 86-7046, 86-7052).

[8] The justification for such line-drawing is certainly not in the Constitution. The Fourteenth Amendment broadly commands the states to afford parties Due Process in *every* situation in which it proposes to deprive them of life, liberty, or property; the Amendment nowhere limits the Due Process protection to cases involving "fundamental rights."

Court does nothing else in this case, it should make clear that the Constitution will not permit oppressive state bond requirements to undermine a right of appeal, at least where that appeal involves fundamental constitutional rights, as it did in *Henry*. Situations comparable to the facts involved in *Henry* are arising with some frequency,[9] and it is vital that the rule adopted here leave

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[9] For example, quite recently the Mississippi chapter of the NAACP sponsored a boycott of white businesses and public schools in Indianola to respond to apparent racial discrimination in the local school system. United Press International, Apr. 16, 1986, § Regional News (available on NEXIS). State and local NAACP chapters are also involved in a boycott of white merchants in the prosperous suburb of Dearborn, Michigan, which excluded nearby blacks from a local park by means of a "residents only" rule, N.Y. Times, Oct. 10, 1986, at A14, col. 3; a boycott of Shell Oil products to protest that company's investment ties to South Africa, Platt's Oilgram News, § United States, vol. 64, no. 161, at 3; a boycott of white businesses in Baton Rouge, Louisiana, to protest allegedly racially motivated grievances lodged against a black school principal, "Local NAACP Board Votes to Boycott White Merchants," Associated Press, May 29, 1986 (available on NEXIS); and a school boycott in a rural Georgia district to protest the lack of minority teachers, "Lack of Black Teachers Sparks Rural Georgia School Boycott," Associated Press, Aug. 23, 1986, § Domestic News (available on NEXIS). The NAACP has also been sued for defamation for its criticism of a police officer for unnecessary brutality in effecting an arrest. *NAACP* v. *Moody*, 350 So. 2d 1365 (Miss. 1977).

In yet another example, three senior citizens seeking free access to a local community center for NAACP meetings staged a lawn-chair protest outside the mayor's drugstore to discourage business. The three were then arrested under a Mississippi anti-boycott statute enacted as a result of the civil rights actions at issue in *Henry*. "Lawn Chair Protesters May Be Back When It's Cooler," Associated Press, Aug. 26, 1986, § Domestic News (available on NEXIS); "Store Boycott Spurs Constitutional Fight," L.A. Times, May 23, 1986, Part 1, at 19, col. 1. After repeated arrests, the bond on one of the participants, the president of the local NAACP chapter, rose to $10,000, forcing the group to abandon the protest temporarily for financial reasons. Although the state Attorney General's office declined to prosecute, private civil action by the mayor remains possible. "Lawn Chair Protesters May Be Back When Its Cooler," Associated Press, Aug. 26, § Domestic News.

open the opportunity for parties to protect their access to the appellate courts in such cases.[10]

II. State Court Defendants Seeking To Vindicate Their Due Process Guarantee Of Access To A State Appellate Forum Are Entitled To Choose Either The Federal Or The State Court In Which To Pursue That Claim

Beyond its contention that an oppressive supersedeas bond can never violate Due Process, Pennzoil's primary argument in this appeal is that any attack on a supersedeas bond must be brought, if at all, in state court. This argument is premised on essentially three contentions, all of which are wrong and should be expressly rejected by the Court in this case: (1) that an attack on a supersedeas bond constitutes a prohibited "appeal" of a state court decision; (2) that in certain kinds of cases Congress did not intend a party to have the choice of a federal forum for its constitutional claims; and (3) that a state-court defendant must exhaust state-court remedies before going to federal court.[11]

First, contrary to Pennzoil's contention, any suit charging that a supersedeas bond unconstitutionally deprives a judgment debtor of access to a state appellate forum is *wholly collateral* to the merits of the underlying state litigation. As this Court indicated in *National Socialist*

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[10] All of these situations present potential *Henry* problems. Inherent in any case in which the NAACP must defend a state court action for damages arising from its expressive activities is the potential for a crippling yet unconstitutional, judgment subject to immediate enforcement unless the NAACP posts an equally crippling supersedeas bond to preserve an appeal made virtually irrelevant by the bond itself. Each such case poses circumstances in which Pennzoil's position in this case could effectively preclude vindication of federal constitutional rights.

[11] Regarding the other elements of Pennzoil's argument (the state action issue, the Anti-Injunction Act, 28 U.S.C. § 2283, and *Younger* v. *Harris*, 401 U.S. 37 (1971)), the NAACP defers to and agrees with the Second Circuit's analysis. *See Texaco*, 784 F.2d at 1145-53.

Party of America v. *Village of Skokie*, 432 U.S. 43, 44 (1977), the issuance of a stay of judgment pending appeal constitutes a matter "separable from and collateral to" the merits of the judgment itself. This Court's holdings in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983) and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) are therefore inapplicable to such a collateral suit. Both *Rooker* and *Feldman* reflected attempts by unsuccessful state-court litigants to *relitigate* their constitutional claims in a federal court. By contrast, like Texaco in the instant case, the NAACP does not assert a right to review of state decisions by inferior federal courts. Instead, the NAACP wishes merely to preserve the opportunity to bring a collateral § 1983 action in the *first instance* in federal court—an action designed to do no more than protect access to the state forum and, if necessary, to this Court.

Second, again contrary to Pennzoil's position, the right of a § 1983 claimant to bring its Due Process "access" claim in the first instance in a federal forum is firmly established in § 1983 jurisprudence. Discussing the legislative history of § 1983, this Court in 1982 stated that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Patsy* v. *Board of Regents*, 457 U.S. 496, 503 (1982) (citing *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).[12] Indeed, this Court has stated that

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[12] This Court has given exhaustive consideration to the legislative history of § 1983 on numerous occasions, noting repeatedly Congress' intent to accord a claimant the choice of forum. *See, e.g., Patsy*, 457 U.S. at 506; *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961) (observing that the federal action is independent of and supplementary to any state remedies).

> [t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964) (emphasis added) (footnote omitted). Pennzoil's contention that a state-court defendant has no choice to bring its collateral federal claim in a federal court is simply wrong.[13]

Finally, Pennzoil's suggestion that a state-court defendant must in any event take its federal claim *first* to state court is not only wrong, but it deceptively implies that a party could *thereafter* go to federal court with the same claim. This Court has held conclusively that state remedies need not be exhausted before § 1983 claimants can present their claims for federal adjudication. *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982); *Steffel* v. *Thompson*, 415 U.S. 452 (1974).[14] Moreover,

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[13] Pennzoil makes a related contention that is also wrong—that a defendant wishing to stay a state-court judgment has no need to bring a collateral federal action, but has only to seek a stay in the state appellate system and thereafter from this Court. *See* Brief for Appellant at 37-38 n.34 and accompanying text. This Court squarely rejected this contention in *England*:

> It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review, even when available by appeal rather than only by discretionary writ of certiorari, *is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts.*

Id. at 416 (emphasis added) (citations omitted).

[14] As this Court stated:

> "When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or

while urging that exhaustion be required in this case, Pennzoil fails to acknowledge that such exhaustion would thereafter deprive § 1983 claimants of access to a federal forum under principles of *res judicata*.[15]

In short, if Pennzoil were correct, a state-court defendant would have to bring its collateral attack on a supersedeas bond in state court and, having done so, would be precluded from thereafter bringing that attack in federal court. This is not the law and is plainly not what Congress intended in adopting § 1983. Rather, Congress intended that *all* claimants be permitted the choice of a single forum—either state or federal—in which to bring their federal claims. In this case, Texaco chose a federal forum in which to bring its collateral constitutional claim.[16] Pennzoil is wrong to think that it had the power to take that choice away merely by suing Texaco in a state court. The NAACP—to whom such a choice has often been and will continue to be of great importance—urges the Court to affirm Texaco's right to choose.

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administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."

Patsy, 457 U.S. at 500 (quoting *Steffel*, 415 U.S. at 472-73).

[15] In *Allen* v. *McCurry*, 449 U.S. 90 (1980), the Court held that traditional principles of issue preclusion prevent a litigant from relitigating in a federal action § 1983 issues fully and fairly adjudicated in previous state-court proceedings.

[16] Indeed, the Second Circuit found that, in the circumstances of this case, the state forum would not have afforded Texaco a fair and timely opportunity to present its constitutional claim. 784 F.2d at 1144-45.

CONCLUSION

For the reasons discussed above, amicus curiae National Association for the Advancement of Colored People urges this Court to affirm Texaco's choice of a federal forum and, should it find that Texaco's supersedeas requirements were so oppressive as to deny Texaco a meaningful opportunity for appellate review, to affirm the limited stay relief granted below.

Respectfully submitted,

DAVID S. TATEL *
ALLEN R. SNYDER
WALTER A. SMITH, JR.
BRADLEY SAXTON
DEBORAH J. JEFFREY
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amicus Curiae National Association for the Advancement of Colored People

GROVER G. HANKINS
General Counsel
National Association for the Advancement of Colored People
4805 Mount Hope Drive
Baltimore, MD 21215
(301) 358-8900

* Counsel of Record